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In The

Supreme Court of the United States

October Term, 1972

No. 72-992

EDWARD THOMAS MURRAY,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the trial court, i.e., defendant and Commonwealth.

QUESTION PRESENTED

Was the denial of defendant's motion for the production of prior written statements of prosecution witnesses, for use in cross-examination and for impeachment of those witnesses

at trial, a violation of defendant's constitutional rights to due process guaranteed by the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

The "Statement of the Case" set out in defendant's brief is substantially correct, and is hereby adopted by the Commonwealth.

LAW AND ARGUMENT

Was The Denial Of Defendant's Motion For The Production Of Prior Written Statements Of Prosecution Witnesses, For Use In Cross-Examination And For Impeachment Of Those Witnesses At Trial, A Violation Of Defendant's Constitutional Rights To Due Process Guaranteed By The Fourteenth Amendment To The Constitution Of The United States?

The defendant asserts in his brief that this Court has never decided the question of whether the due process clause of the Fourteenth Amendment requires the production of statements of prosecution witnesses for use by the defense in a criminal trial in a state court, in line with the decision of *Jencks* v. *United States,* 353 U.S. 657 (1957). As pointed out in defendant's brief, it was stated by this Court in *Palermo* v. *United States,* 360 U.S. 343 (1959), that the decision in *Jencks* was not based on principals of constitutional law, but was founded in the power of the Supreme Court to prescribe procedures for the administration of justice in the federal courts.

Following the decision of *Jencks,* Congress enacted the Jencks Act, 18 U.S.C. § 3500, which put into statute the effect of the *Jencks* decision. *Palermo* was decided subsequent to the Jencks Act and involved the construction of that Act. Contrary to the assertion in defendant's brief, this

Court has specifically stated that *Jencks* v. *United States, supra,* and the Jencks Act are not applicable to criminal trials in state courts. *United States* v. *Augenblick,* 383 U.S. 348 (1969). As stated in the opinion in *Augenblick,* the "*Jencks* decision and the Jencks Act were not cast in constitutional terms .... They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials." The Court admitted that there might be situations where denial of the production of a defendant's statement might be a denial of a Sixth Amendment right, but the facts in *Augenblick* did not make that case "a worthy candidate for consideration at the constitutional level."

The same can be said of the instant case where there is no evidence that the defendant was denied any information he did not already have which would be exculpatory to him, see *Brady* v. *Maryland,* 373 U.S. 83 (1963), and there is no evidence that he was denied compulsory process to obtain witnesses for his defense.

The ruling of the trial court in the instant case was based upon Rule 3A:14, of the Rules of Criminal Practice and Procedure, enacted by the Virginia Supreme Court to govern criminal trials in Virginia. Subsection (2) of said Rule reads as follows:

> "Upon written motion of an accused a court may order the Commonwealth's Attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the item sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Common-

wealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (2) of subparagraph (b)(1) of this Rule."

The exception referred to above in subparagraph (b) of Rule 3A:14 relates to the inspection of reports such as ballistic tests, fingerprint analyses, blood tests, and other scientific reports, etc.

The defendant has shown no valid reasons why Rule 3A:14, above, should be held unconstitutional in controlling the discovery and inspection of statements of the Commonwealth or in governing the conduct of criminal trials in Virginia. Defendant attempts to analogize his situation with *Brady* v. *Maryland, supra;* however, such an analogy is misplaced, inasmuch as *Brady* involved matters which were exculpatory to the defendant, not matters which might possibly be interesting to him or might possibly affect his cross-examination of a witness.

CONCLUSION

For the foregoing reasons, the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gilbert W. Haith, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 6th day of April, 1973, I mailed three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to Jerrold G. Weinberg, Esquire, and Peter W. Smith, IV, Esquire, Stackhouse, Weinberg & Stewart, 1400 Virginia National Bank Building, Norfolk, Virginia, 23510, counsel for petitioner.

GILBERT W. HAITH
Assistant Attorney General